

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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BALTIC AUTO SHIPPING, INC.)

COMPLAINANT,)

v.)

) DOCKET NO. 14-16

MICHAEL HITRINOV a/k/a)
MICHAEL KHITRINOV,)
EMPIRE UNITED LINES CO., INC.,)

RESPONDENTS.)
-----)

**RESPONDENTS' REPLY TO COMPLAINANT'S COUNTER-STATEMENT OF
MATERIAL FACTS**

Respondents herewith file and serve their Reply to Complainant's Counter-Statement of Material Facts.

Complainant has willfully refused to abide by the specific instructions of the Initial Order, placing an inordinate burden on the Tribunal – and the Respondents¹. In addition, the “facts” disputed or added in the Complainant's Counter-Statement of Material Facts are neither material nor germane. For these reasons (amplified upon below), the Complainant's Counter-Statement of Material Facts should be disregarded; the Respondents' Material facts accepted; and the Motion for Partial Summary Decision granted.

¹ This has made it impossible to address Complainant's “disputed” or “added” facts on a fact-by-fact basis.

POINT ONE: COMPLAINANT HAS DISREGARDED THE INSTRUCTIONS OF THE INITIAL ORDER BECAUSE IT DID NOT ADMIT OR DENY EACH OF RESPONDENTS' STATEMENTS. IN ADDITION, ITS RESPONSE IS REPETITIOUS. ACCORDINGLY, THE COMPLAINANT'S "COUNTER-STATEMENT" SHOULD BE DISREGARDED

Even though the specific terms of the Initial Order were brought to the attention of the Complainant, it has failed to abide by the instructions. The instructions were meant to provide an economic, efficient procedure to sort out the parties' disagreements as to the material facts involved in the instant Motion for Partial Summary Decision.

The Complainant was to "file a responding statement either admitting or disputing each of the facts in movants' statement" (Initial Order ["IO"] ¶15) (emphasis added). Complainant has not complied with the instructions.

Instead, all that Complainant has done has been to cut and paste elements of its earlier pleadings – often of paragraph length.

This is in direct disobedience to the Initial Order which provides that facts must be separately stated in a numbered paragraph, and "Each paragraph must be limited as nearly as practicable to a single factual proposition" (IO, ¶ 15) (emphasis added).

Because of Complainant's blatant disregard of the Commission's Initial Order, and the burden it has now placed on the Respondents – and the Tribunal – to sort through the Counter-Statement, the Counter Statement should be disregarded in its entirety; the Respondents' statement of material facts accepted; and the Motion for Summary Decision granted.

The Commission's Rules provide for this specific remedy:

"A repetitious motion will not be entertained."

46 CFR 502.69 (d) (Rule 69)

**POINT TWO: COMPLAINANT'S "DISCOVERY" OF FACTS – WHETHER
WITH RESPECT TO "ALTERED" SHIPPING DOCUMENTS OR RATES - ARE IR-
RELEVANT TO THE MOTION AT HAND – AND DO NOT TOLL THE RUNNING OF
THE STATUTE OF LIMITATIONS**

The Complainant claims that it has "discovered" that the Respondents' shipping instructions to MSC (the VOCC) (§ 8 of Complainant's Counter-Statement of Material Facts) differed from the Complainant's shipping instructions to the Respondent (§§ 43-45).

As noted in Respondents' Reply, this practice is neither a violation of the Shipping Act, nor the Commission's regulations. Indeed this practice is a common, and useful, shipping practice. The difference in the statutory role of the NVOCC vis-à-vis the actual shipper and its role vis-a-vis the VOCC acknowledge by implication that the terms of the shipping instructions may be different.

In any event, the "discovery" of this fact is not material to the motion at hand. It should be disregarded.

The Complainant states that "The respondents' shipping instructions to MSC are being revealed [apparently to the Complainant] for the first time" (§ 45). So? These documents are of concern to MSC and the Respondents, but do not affect the Complainant one way or the other.

The Complainant fails to explain what effect the “discovery” has on the Motion for Partial Summary Decision. As the Complainant’s “discovery” is not relevant to Complainant, nor the Motion, it cannot toll the statute of limitations. The “fact” is not material and should be disregarded.

Similarly, Complainant’s reliance on the “Audit” as a “discovery” tolling the statute of limitations is equally unavailing to defeat the Motion, as it is neither relevant nor germane, and is certainly not a “material” fact insofar as the Motion is concerned (see ¶¶ 71-75).

As Respondents’ have demonstrated, the Complainant had either actual or constructive notice as the provisions of the Respondents’ tariffs – as a matter of law – at the time of the initial bookings. That Complainant may have actually discovered that there may have been different rates charged to other customers is of no moment with respect to the Motion. The wrong complained of was with respect to shipments booked more than three years prior to the filing of the FMC Complaint, at rates agreed to or at least accepted by the Complainant. Any “discovery” of different rates (assuming the Audit is accurate) is only a confirmation, at best, of information of which the Complainant is charged with knowing. As such, it cannot serve to “toll” the running of the statute of limitations. The statute began to run at the time of booking; and has now extinguished the Complainant’s claim of alleged disparate treatment.

POINT THREE: THE COMPLAINANT’S “CONTINUING” VIOLATIONS ARE NOT CONTINUING – THEY WERE EXTINGUISHED BY THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE

The Complainant makes much of its “demand” for invoices, and its “demand” for house bills of lading, as well as the fact that the “demands” were ignored by the Respondent (see ¶ 65).

The Complainant admits that the parties had been doing business on the basis of “no freight invoices”, and “no house bills of lading” since at least 2008 (see ¶ 39) – without complaint.²

One, out of context email excerpt, sent while the parties were in the final throes of the billing-and-delivery dispute in late 2011, cannot be accepted as some sort of “material fact”, or a dispute that continues to this day.

Further, any “need” for invoices or house bills of lading was extinguished when the parties agreed on the payments to be made for the delivery of the shipments at issue – all as memorialized in the Settlement Agreement and Mutual Release. The documentary evidence produced by the Complainant demonstrates that there was an orderly notice of arrival of goods at destination; payment of freight charges; and prompt delivery of the goods (see Presniakovas Aff. Ex. P). The need for invoices and house bills of lading died with the Settlement Agreement and Mutual Release – and the death occurred more than three years prior to the filing of instant Complaint, accordingly, if there is a claim here (which is denied), it is time-barred.

POINT FOUR: SAVANNAH BALTIC SHIPMENTS ARE SIMPLY NOT RELEVANT TO THIS MOTION – IT HAS ALREADY BEEN FOUND THAT THEY ARE NOT COMPLAINANT’S SHIPMENTS.

Despite the finding of this Tribunal, Complainant continues to argue that shipments made in the names of third parties somehow redound to the benefit of the Complainant, and because

² See November 11, 2011 email from Complainant to Respondents stating “I never received any invoices from Empire although we requested several times”, to which the Respondents responded: “How did you pay the money for several years if you did not receive any invoices? How did you know how much to pay?” (Ex. G to Presniakovas Aff.)

they occurred within three years of the filing of the FMC Complaint, defeat the time-bar defense (see ¶ 11).

The Baltic Savannah shipments are irrelevant, and cannot amount to a “material” fact that is in dispute. Accordingly, all of the discussions about the Savannah shipments should be disregarded.

POINT FIVE: THE FACTS ASSERTED BY THE COMPLAINANT ARE, FOR THE MOST PART NEITHER “MATERIAL” NOR EVEN GERMANE TO THE INSTANT MOTION, AND SHOULD BE DISREGARDED

The instant Motion for Summary Disposition is based on the Respondents’ defenses of time-bar and release. Insofar as the Complainant’s “Counter-Statement” addresses quibbling interpretations of the meaning of shipping terms³, the parties agreed upon invoicing and documentation policies⁴, the nuances of the Settlement Agreement and Mutual Release⁵, or the meaning of a partial email extract⁶ (proffered without any context), such “facts” do not address the issue of time-bar and release, and should be disregarded.

POINT SIX: COMPLAINANT’S “ADDITIONAL” FACTS ARE JUST A REHASH OF OLD PLEADINGS

³ See, for example, ¶¶ 5,6,32, 41, 43

⁴ See, for example ¶¶ 4,8,11-13, 19

⁵ See, for example ¶¶ 32-35

⁶ See, for example, ¶ 14

As with the “disputed” facts, Complainant disobeys the Initial Order and submits paragraphs, and internally complex sentences – not “single factual propositions” as required by the Initial Order (IO, ¶ 15).

The additional facts are simply a re-hash of other grievances (contrived or otherwise) (see ¶¶ 68-70), which, for the most part, fail to address the instant Motion or the time-bar and release defenses.

Accordingly, they should be disregarded

POINT SEVEN: THAT SHIPMENTS PAID FOR AND RELEASED PURSUANT TO THE SETTLEMENT AGREEMENT WERE DELIVERED IN 2012 IS UNAVAILABLE – THE DELIVERIES DID NOT VIOLATE THE SHIPPING ACT – NOR IS THERE ANY CLAIM THAT THEY DID

The Complainant offers the following “fact”: “ ...[Respondent] ... refused to release ... for an extended period of time ... not until early 2012” (¶ 46).

This statement seems to refer to the arrival, notification, payment of freight charges, release and delivery of the shipments which were covered by the Settlement Agreement and Mutual Release.

Complainant fails to support this statement with any reference to any contemporaneous document⁷. What the Complainant does show is that after Complainant filed a lawsuit, the Respondents preferred to communicate through counsel (see ¶¶ 56-58, 60-63). Seems prudent under the circumstances.

⁷ Indeed, Ex. P to the Presniakovas Affidavit, submitted by the Complainant, shows just the opposite.

Apparently (but it is by no means clear – and on this basis alone the “fact” should be disregarded), the Complainant believes that the orderly, non-contentious process of payment-and-delivery within three years of the filing of the FMC Complaint somehow protects the Complainant’s claims from dismissal on statute of limitations grounds.

The gravamen of the Complainant’s FMC Complaint is that Respondents charged unfair freight rates, and wrongfully withheld delivery. These particular acts occurred more than three years prior to the filing of the FMC Complaint. That the problems were eventually sorted out is not a material fact that would toll the statute of limitations – and Complainant fails to show how it might.

POINT EIGHT: DOUBLE PAYMENT DISPUTE – NOT RELEVANT TO THE MOTION; NOT AN ACT OF RESPONDENT

As shown in the Respondents’ Reply, Respondent had no participation – at all – with this incident. As the Complainant has amply demonstrated⁸, MSC requested payment; Complainant (without consulting Respondent) made the payment. This does not amount to a “material” or even relevant) fact, and must be disregarded.

POINT NINE: FIVE SHIPMENTS TO KLAIPEDIA⁹

⁸ See respondents’ Memorandum in Reply, Point Two
⁹ See ¶¶ 66 - 69

As Respondent has shown in its Reply (Point Three) and the Hitrinov Certification attached thereto, these are not Complainant's shipments. Accordingly, the claim should be disregarded, and the "facts" offered by Complainant ignored.

POINT TEN: DISPUTES NOT EXPLAINED; MATERIALITY NOT ADDRESSED

See Paragraphs 18, 19, 32, 34, 35.

These paragraphs are either not material to the instant Motion, or lack sufficient specificity to permit Respondents to reply. The confusion should be held against the Complainant for refusing to follow the instructions in the Initial Order.

CONCLUSION

As Complainant has willfully refused to abide by the specific instructions of the Initial Order, placing an inordinate burden on the Tribunal – and the Respondents, and because the "facts" disputed or added are neither material nor germane, the Complainant's Counter-Statement of Material Facts should be disregarded, the Respondents' Material facts accepted, and the motion for Partial Summary Decision granted.

Respectfully submitted,

By:



Gerard S. Doyle, Jr.

THE LAW OFFICE OF DOYLE & DOYLE

636 Morris Turnpike

Short Hills, NJ 07078

973-467-4433 (Telephone)

973-467-1199 (Facsimile)

gdoyle@doylelaw.net
Attorneys for Respondents
Michael Hitrinov, a/k/a
Michael Khitrinov, and
Empire United Lines, Co., Inc.

Dated in Short Hills, NJ twenty sixth day of May 2015.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the RESPONDENTS' REPLY TO COMPLAINANT'S COUNTER-STATEMENT OF MATERIAL FACTS upon Complainant's counsel, Marcus A. Nussbaum, Esq., with the address of P.O. Box 245599, Brooklyn, NY 11224 by first class mail, postage prepaid and by email (marcus.nussbaum@gmail.com); and that the original and five (5) copies are being filed with the Secretary of the Federal Maritime Commission.



Gerard S. Doyle, Jr.
THE LAW OFFICE OF DOYLE & DOYLE
636 Morris Turnpike
Short Hills, NJ 07078
973-467-4433 (Telephone)
973-467-1199 (Facsimile)
gdoyle@doylelaw.net
Attorneys for Respondents
Michael Hitrinov, a/k/a
Michael Khitrinov, and
Empire United Lines, Co., Inc.

Dated in Short Hills, NJ. this twenty sixth day of May, 2015.